No. 78-1424

In the Supreme Court of the United States

OCTOBER TERM, 1978

DARREL E. SHELTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The district court issued no written opinion. The opinion of the court of appeals (Pet. App. 1-18) is reported at 588 F. 2d 1242.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1978. The court denied a petition for rehearing on January 17, 1979. By order dated February 5, 1979, Mr. Justice Rehnquist entered an order extending the time within which to file a petition for a writ of certiorari to and including March 16, 1979 (Pet. 2). The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government's good faith failure to turn over a temporarily missing interview report of a readily available person petitioner failed to subpoena after he learned of the government's inability to find the report entitles petitioner to a new trial under *Brady* v. *Maryland*, 373 U.S. 83 (1963).

2. Whether the trial court correctly instructed the jury on the theory of petitioner's defense.

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of willfully filing a false income tax return for 1972, in violation of 26 U.S.C. 7206(1) (Pet. App. 1-2). The district court sentenced him to a term of 18 months' imprisonment and a $5,000 fine. The court suspended the sentence of imprisonment and placed petitioner on three years' probation on the condition that he serve the first six months of the probationary period in a "jailtype institution" and timely pay his fine (R. 622).[1]

The evidence presented by the government showed that petitioner, as business manager of Iron Workers Union, Shopmen's Local 509, had received payments in 1972 totaling $7,220.19 (Pet. App. 3 n.2) in cash and other property from Joseph Hauser. Hauser was an insurance company official who sought to induce petitioner to abandon the local's existing prepaid group health insurance plan and adopt in its place a group health insurance plan offered by a company controlled by Hauser. The evidence showed that petitioner had

[1] "R." references are to the clerk's record in the court of appeals, and "Tr." references are to the reporter's transcript of proceedings.

willfully failed to report this income on his 1972 federal income tax return (Pet. App. 2). Petitioner admitted receiving four noncash items from Hauser, but he claimed that these items were gifts unrelated to the adoption of the health insurance plan and, hence, not subject to income tax (Pet. App. 3). Both petitioner and Hauser denied the existence of any cash payment (Pet. App. 3; Tr. 695).

Under a grant of immunity Ronald Prohaska, a former official in petitioner's union local, testified, *inter alia*, that shortly after Hauser and petitioner learned that the government was investigating them, Hauser called a meeting attended by petitioner, Prohaska and Hauser's bookkeeper, Sidney Krems, in which they attempted to identify any payments made by Hauser that could "haunt" them in the investigation (Pet. App. 4). Both petitioner and Hauser denied that any such meeting had occurred (Pet. App. 10-11). During petitioner's cross-examination of Prohaska, petitioner requested that the government produce "[i]nterview reports of a bookkeeper named Sidney Krems" (Pet. App. 10). The government responded that Krems was equally available to petitioner. Although petitioner did not dispute Krems' availability (Pet. App. 11-13), the district court ordered the government to produce any interview reports of Krems and ordered that Krems' last known address be made available to petitioner (Pet. App. 12).

The following day, the prosecutor reported that he had located one statement made by Krems, which he turned over to petitioner, and that he understood that a second interview report existed but could not be located (Pet. App. 12). The prosecution continued the search in good faith (*ibid.*), but the missing Krems

statement was not discovered until this case was on appeal, when it was discovered during a search of other files in connection with another case.[2] Once the second statement was found, the government immediately turned it over to petitioner and the court of appeals, which considered it in rendering its decision (Pet. App. 9 n.9).

The court of appeals affirmed. It found that while the Krems statement should have been turned over to petitioner in light of his specific request,[3] he was nevertheless not entitled to a new trial because, after being alerted that the government was having difficulty locating the missing statement, he failed to subpoena Krems or to inform the district court that he was having difficulty finding Krems (Pet. App. 12-14).

ARGUMENT

1. Petitioner contends (Pet. 10-16) that the government's inability to produce the missing Krems

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[2]This case was part of a broader criminal investigation. As the court of appeals noted (Pet. App. 8 n.7), the government had accumulated massive investigative files.

[3]The missing report related to an interview with Krems conducted by an Internal Revenue Service agent in connection with an investigation of Krems. In that interview, the agent asked Krems some questions concerning Joseph Hauser. The report stated (Pet. App. 10) that "KREMS insisted that he was innocent of any wrongdoing. He stated 'I know of no payoffs that JOE made to anyone,' and 'I am not aware of any payoffs or cover-ups.' " The court of appeals found that this statement was cumulative of the testimony of petitioner and Hauser, the other participants in the coverup meeting. It nevertheless concluded that nondisclosure in the face of a specific request might have affected the outcome of the trial (Pet. App. 11). Since the Krems interview report would have been inadmissible as hearsay, the substance of Krem's interview could have only been put before the jury by means of his direct testimony—a course petitioner failed to pursue. It is therefore difficult to see how the nondisclosure of the report could have affected the jury verdict.

interview report in response to his specific request during presentation of the government's case, entitles him to a new trial under the rule of *Brady* v. *Maryland*, 373 U.S. 83, 86-88 (1963). But the courts of appeals have generally held that " '[t]he government is not required to make a witness' statement known to a defendant who is on notice of the essential facts which would enable him to call the witness and thus take advantage of any exculpatory testimony he might furnish.' " *United States* v. *DiGiovanni*, 544 F. 2d 642, 645 (2d Cir. 1976), quoting *United States* v. *Stewart*, 513 F. 2d 957, 960 (2d Cir. 1975). See also *United States* v. *Craig*, 573 F. 2d 455, 492 (7th Cir. 1977), cert. denied, No. 77-1502 (Oct. 2, 1978); *United States* v. *Weidman*, 572 F. 2d 1199, 1207 (7th Cir. 1978), cert. denied, No. 77-1552 (Oct. 2, 1978); *Brown* v. *United States*, 556 F. 2d 224, 228 (3d Cir. 1977); *Wallace* v. *Hocker*, 441 F. 2d 219, 220 (9th Cir. 1971).

After Ronald Prohaska testified that Krems had attended the coverup meeting with petitioner and Hauser, petitioner was informed that Krems' missing interview report existed, was given Krems' last known address, and was informed, well in advance of the conclusion of the trial, that the prosecution was diligently searching its files but having difficulty locating the missing report. However, petitioner never advised the district court that he was having difficulty locating Krems, and, at all events, chose not to compel his appearance as a defense witness (Pet. App. 11-12). The court of appeals therefore correctly held (Pet. App. 13-14) that the combination of the nature of the government's response to the request for the Krems'

statement[4] and petitioner's lack of diligence in failing to seek out or subpoena Krems[5] established that the failure to locate and disclose the statement did not deprive petitioner of a fair trial. See *United States* v. *Dansker*, 565 F. 2d 1262, 1266 (3d Cir. 1977), cert. dismissed, 434 U.S. 1052 (1978); *United States* v. *Craig*, *supra*, 573 F. 2d at 492; *United States* v. *Weidman*, *supra*, 572 F. 2d at 1207; *United States* v. *Prior*, 546 F. 2d 1254, 1259 (5th Cir. 1977).

Petitioner further argues (Pet. 13-16) that *United States* v. *Agurs*, 427 U.S. 97 (1976), imposes no requirement of diligence upon the defendant. But unlike this case, the Court in *Agurs* carefully noted that there was no lack of diligence on the part of the defendant (*id.* at 102). Here, petitioner does not contend that he was deprived of a fair trial by the government's inability to produce the missing Krems interview report. Accordingly, the court of appeals correctly concluded (Pet. App. 14) that the non-disclosure of Krems' statement did not deprive petitioner of a fair trial. Since petitioner knew Krems but neglected to call him to testify, the court properly declined (Pet. App. 13) to grant him a new trial simply to satisfy the "sporting theory of justice" that this Court condemned in *Brady* v. *Maryland*, *supra*, 373 U.S. at 90.

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[4]The court of appeals found that the government had made a good faith attempt to locate the missing report (Pet. App. 12). See, *e.g.*, *United States* v. *Rose*, 590 F. 2d 232, 237 (7th Cir. 1978); *United States* v. *Miranda*, 526 F. 2d 1319, 1327-1329 (2d Cir. 1975), cert. denied, 429 U.S. 821 (1976).

[5]It was undisputed (see Pet. App. 11-12) that Krems was available to the defense. As the court of appeals pointed out, Krems was Hauser's bookkeeper, and Hauser, who cooperated fully with the defense, knew how to reach him (see Pet. App. 13).

2. Petitioner also claims (Pet. 16-22) that the district court failed to instruct the jury adequately on the defense theory that some of Hauser's payments to petitioner were gifts and not gross income. While the district court did not instruct the jury in the precise language requested by petitioner, it gave the substance of petitioner's instruction and adequately instructed the jury as to the defense theory of the case. See, *e.g.*, *United States* v. *Pallan*, 571 F. 2d 497, 501 (9th Cir.), cert. denied, 436 U.S. 911 (1978); *United States* v. *Afflerbach*, 547 F. 2d 522, 524 (10th Cir.), cert. denied, 429 U.S. 1098 (1977).

The district court instructed the jury that gross income does not include the value of gifts (26 U.S.C. 102(a)) and that the determination of whether a particular payment is a gift depends primarily on the "*transferor's* intent[ion]" (Pet. App. 15; emphasis by the court). Accord: *Commissioner* v. *Duberstein*, 363 U.S. 278, 280-286 (1960).[6] Moreover, the court instructed the jury that petitioner could not be convicted unless his failure to report income was found to be "willful" and correctly stated that "the term 'willfully' means deliberately and with knowledge, as distinguished from careless, inadvertent or negligent. That is to say, the defendant knew and specifically intended the return to be false when he made, subscribed and filed it" (Pet. App. 15). See *United States* v. *Pomponio*, 429 U.S. 10, 11 n.2, 12 (1976).

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[6]The district court instructed the jury as follows (Tr. 1091-1092):

> Gross income does not include the value of property acquired by gift. The most critical consideration in determining whether a given transfer constitutes a gift is the

These instructions correctly advised the jury that it could not convict unless it found that petitioner intended the return to be false, and had to acquit if petitioner mistakenly believed that the payments made by Hauser were gifts, even though Hauser may not have intended those payments as gifts. Since the trial court correctly charged the jury as to the applicable law and allowed the defense to argue its precise factual contentions to the jury in the context of the court's general instruction (see *United States* v. *Campanale*, 518 F. 2d 352, 362 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976)), the court of appeals correctly held (Pet. App. 16) that there was no abuse of discretion in the refusal to give a more specific instruction.[7]

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transferor's intention. A gift proceeds from detached and disinterested generosity, out of affection, respect, admiration, charity or like impulses. When, on the other hand, the payment or transfer of property proceeds from the anticipated benefit of economic nature, it's not a gift. What the transferor's intention was as to any item, and whether the transfer of any item of property was or was not a gift, are questions of fact for the jury to determine.

[7]While a more specific instruction, in addition to the general willfulness instruction given here, would have been proper under *United States* v. *Pomponio*, *supra*, 429 U.S. at 13 n.4, petitioner cites no authority to support his narrow contention (Pet. 19-22) that where, as here, the jury is otherwise properly instructed as to the applicable law governing the defense theory, an additional instruction paraphrasing the defendant's specific factal contentions is required.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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